

## ESA Overview Module 4 – Section 7, Interagency Consultation Text

### How to Initiate Consultation (slides 31 - 40)

#### How to Initiate Consultation

In the Endangered Species Act, the documentation required to initiate consultation is often called a Biological Assessment or BA. The Endangered Species Act **requires** preparation of a Biological Assessment for certain situations that we will discuss momentarily. Sometimes agencies use different terms for the documents used in consultation. Whatever your agency or office calls this document; the information required is essentially the same.

The purpose of a Biological Assessment is to evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether listed species or critical habitat will be adversely affected. It is used to determine whether formal consultation or a conference is necessary. Notice that the Biological Assessment is both for listed and proposed species and habitat. We will discuss proposed species and habitat later on in this presentation.

The Biological Assessment criteria may be found at 50 CFR 402.12 and 50 CFR 402.14. We will refer to these regulations many times during this module so you may want to have them available for reference. Preparation of a Biological Assessment begins with a list of the species or habitat that might be affected by the action.

The Endangered Species Act does not define what should be included in a Biological Assessment but the regulations at 50 CFR 402.14 specify what must be included in the formal consultation request:

1. A description of the action to be considered,
2. A description of the specific area that may be affected by the action,
3. A description of any listed species or critical habitat that may be affected by the action,
4. A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects
5. Relevant reports, including any environmental impact statements or biological assessments prepared, and
6. Any other relevant available information on the action, the affected listed species, or critical habitat

Thus, it is important to make sure that your Biological Assessment includes these 6 mandatory items if you are initiating formal consultation.

You may recall that at the beginning of this segment I said that the ESA **requires** preparation of a Biological Assessment for certain situations.

The first situation is that if the project is a Major Construction Activity. A Major Construction Activity is defined as a construction project or other undertaking having similar physical impacts, which is a Major Federal Action significantly affecting the quality of the human environment as referred to in NEPA. This includes dams, buildings, roads, water developments, channel improvements and other such undertakings that significantly modify the physical environment. A general guideline is that if it requires an EIS and has construction like impacts, then it may be a Major Construction Activity.

The second situation is that a Biological Assessment is required if a Federal agency or applicant wants to apply for an exemption from Section 7(a)(2) – the no jeopardy standard. While an exemption is rarely granted, and as an action agency we may not intend to request an exemption, an applicant may want to preserve their ability to apply for an exemption.

The Endangered Species Act does not define what should be included in a Biological Assessment. The contents of the Biological Assessment are at the discretion of the action agency and depend on the nature of the action. The following may be considered for inclusion (50 CFR 402.12):

The results of an on-site inspection of the area affected by the action agency to determine if listed or proposed species are present or occur seasonally,

The views of recognized experts on the species at issue,

A review of the literature and other information,

An analysis of the effects of the action on the species and habitat, and

An analysis of alternative actions considered by the Federal agency

Preparation of the Biological Assessment begins by obtaining a list of the species or critical habitats that may occur in the action area,. The next step is to describe the proposed action in detail. The Biological Assessment should also include any actions or measures proposed as a means to reduce the adverse effects of the action. These actions to reduce adverse effects are called “conservation measures”. An example might be to install sedimentation and erosion control devices if soil movement might result from the project, or to seasonally adjust the project timeframes to avoid sensitive time periods for a species. Remember to describe the project location, and include maps of the action area.

The Biological Assessment should be completed within 180 days of requesting a species list to make sure that no additional listings have occurred.

The Biological Assessment should be submitted to the Services with a cover letter requesting formal consultation, outlining the species involved, the effects determination, and general project location. Make sure that your consultation package includes the 6 mandatory items required by 50 CFR 402.14 for a complete formal consultation request!

So what kind of documentation is required for informal consultation? Or for that matter, what kind of documentation do you need for a no effect determination?

The criteria are not laid out specifically in the Endangered Species Act because the statute did not distinguish between formal and informal consultations. The Services did this with the interagency regulations at 50 CFR 402.14c and the 6 mandatory items for a complete formal consultation request.

Even a No Effect determination requires documentation. You may not need to provide it to the Services, but it may provide protection from legal challenges. You should document the rationale for your No Effect determination.

So now that we've discussed what the regulations say, let's identify the contents in a different way. Essentially what you should include in the Biological Assessment or Consultation Package is the Who, What, Why, When, Where, and How.

**Who** will be doing **What**?

**What** is it you want to do? Describe in detail the proposed action. Explain what tools or methods you'll use to carry out the project – will you use heavy equipment or a shovel?, describe the vegetation,

topography, soils, slope, and so on. Your consultation package may go to someone who is not familiar with the project, the area, or agency jargon, so be as descriptive of the project and methods as possible. **Why** do you want to do the project? What is the objective of the project?

**When** will this happen? What are the timeframes for the project?

**Where** will the project or action occur? Provide the project location, including topographic maps, aerial photographs, and GIS layers.

Is critical habitat or listed species present? Have any surveys been completed using approved protocols? Could the species use the area seasonally? If the species is a plant, were surveys conducted during the appropriate growing or flowering season? Is the area undergoing a drought that might affect germination?

Don't forget to document your own familiarity with the area, the project and the species. For example, if you know a species uses a particular habitat type and that habitat does not occur in the action area, document the absence of suitable habitat and move on to the next species on your list.

**How** will the project affect listed species and what is the timing? What does the literature say about the species or impacts to habitat? What do species experts say? Are there any researchers who have studied the species, or the effects of a similar project on the species in question? Explain the effects and why. Effects include direct effects, indirect effects, cumulative effects, and the effects of activities that are interrelated or interdependent. Are you going to apply any conservation measures to reduce impacts to the species?

Remember: The more information you provide to the Services in the consultation package, the fewer questions they likely will have. If they don't have the required information they may have to make assumptions and that might not have the outcome you hope to achieve. In addition, consultation may be delayed while the requested information is gathered and submitted.

Once consultation is initiated, action agencies and applicants must not make any Irreversible or Irrecoverable Commitment of Resources.

The intent is to keep options open for avoiding jeopardy to a species or adverse modification to critical habitat. This 7(d) restriction remains in effect until consultation has been concluded. In most instances this means that the action cannot be undertaken prior to the receipt of the Biological Opinion.

Congress added the 7(d) restriction in 1978 as a result of the Tennessee Valley Authority's Tellico Dam. Tellico Dam was almost completed when the Tennessee Valley Authority initiated consultation and received a jeopardy Biological Opinion on the snail darter. Since the dam was already in place, there were no options for avoiding jeopardy. Congress added the 7(d) restriction to prevent options for avoiding jeopardy to be foreclosed on for future projects.

For ongoing actions, the action agency may need to sort out what can proceed and what must wait. The Services can provide advice, but the Services cannot provide concurrence. It is the action agencies responsibility to determine what can proceed and what must wait until consultation has been concluded.

One of the requirements for applying for an exemption from Section 7(a)(2), the no jeopardy standard, is that no irreversible or irretrievable commitment of resources has been made. Even if as an action agency we don't intend to apply for an exemption, an applicant may want to preserve their ability to apply for an exemption. Section 7(d) regulations can be found at: 50 CFR 402.09

Now let's move from looking at how to initiate formal consultation to the results of formal consultation - which is the Biological Opinion